CURRENT LEGAL PERIODICALS.

CORPORATIONS.

Collateral Attacks on Corporations. Edward H. Warren.

A. De Facto Corporations.

Probably the best way to give a fair idea of the content of this article is to present the author's own summary which he gives at the conclusion of the paper, as follows:—

1. When the existence of a corporation is only collaterally in issue, proof of facts sufficient to satisfy the requirements of the *de facto* doctrine is sufficient to make a *prima facie* case.

2. If a corporation is in existence, but there is a ground upon which the state might have its existence forfeited, no one but the state can take advantage of this cause of forfeiture.

3. Most failures to conform strictly to statutory provisions regarding the formation and regulation of corporations are not fatal to the formation of a *de jure* corporation. But failure to perform an act, the performance of which the legislature has intended to be a condition precedent to incorporation, is necessarily fatal.

4. There are considerations of public policy so urgent as to justify the courts in holding that a *de facto* corporation may be a conduit of title.

5. The *de facto* doctrine has a very important scope in cases where contracts have been made on a corporate basis.

6. If associates who have not the corporate privilege assume to exercise it, there is no established doctrine that all but the state must submit. It is not proper to apply to such a case the doctrine that the existence of a corporation cannot be attacked collaterally.

7. The *de facto* doctrine should be applied with caution when it is invoked for the benefit of the associates themselves against persons who have not dealt with them as a corporation. It is anomalous to permit the usurper of a right to require a stranger to submit to the assertion of such a right.

8. It is anomalous to bridge a legal gap, even for the benefit of a person who has made an expenditure in good faith.

9. There may be no objection to applying the doctrine for the benefit of the associates themselves against strangers, if the associates are asserting a right which is in them either as natural persons or as a corporation.

10. The doctrine should never be applied for the benefit of the associates themselves to the prejudice of an innocent stranger.

Harvard Law Review, April, pp. 450–480.

The Commerce Clause of the Federal Constitution and Two Recent Cases Dealing With It. S. S. Gregory. The cases discussed are *Howard* v. *Illinois Central Railroad Company*, (148 Fed. 999), and *Brooks* v. *Southern Pacific Company*, (148 Fed. 986). The Statute is the recent Act of Congress which imposes a liability upon common carriers engaged in inter-state commerce for all damages that may result to an employee by reason of any negligence of the carrier. Judge Evans in the Circuit Court for the Western District of Kentucky decided that the Statute was unconstitutional in that it, in

fact, attempted to regulate something which was not commerce at all. Judge McCall in the Circuit Court for the Western District of Tennessee came to practically the same conclusion. Mr. Gregory dissents. He thinks, with all due respect to the two judges that they have overlooked a good deal of the law on the subject and that he has sufficient grounds for believing that if this law is fully set forth it will show that he is right. The fact appears to be that both sides have approached the subject with pre-conceived opinions and that they have reached decisions in accordance with those opinions.

Mr. Gregory cites Chief Justice Marshall in the beginning of his argument, as a matter of course. There is little doubt that this Act, or even very much more sweeping legislation would be justified by an appeal to his opinions, if the premises adopted for the examination were accepted and the method of reasoning were sufficiently subtile. Yet Chief Justice Marshall was born early enough to have come under the influence, personal and mental, of the men who made the Constitution. Some of his most profound arguments show that he had absorbed the theories of that "master-builder of the Constitution," James Wilson, whose interpretation of the Constitution might be used to justify an even wider expansion of the doctrine of nationality. Yet James Wilson was a most profound believer in the right of the State to self government and self regulation; he believed that that power of local self government was as essential to the existence of the nation, as the existence of a strong central government itself. To use John Marshall and James Wilson as exponents of doctrines malevolent or beneficient, which could never possibly have occurred to them, is to belittle them. The opponents of the Constitution, when it was before the people of the separate states for confirmation or rejection, did most violently contend that the national government was "a consolidated government" which would swallow up those of the separate states. Wilson, McKean, Madison, and all the men who had to make the fight for the Constitution before the congresses of the several states, had to deny this accusation with all the power of argument and all the depth of reasoning at their command. We owe to the fact that they were successful, the existence of our Constitution. It is idle, therefore, to claim that they, or the men who were trained in their ideas, favored "a consolidated government" in the sense in which their opponents spoke. Mr. Gregory at the end of his article again appeals to Marshall as saying that he nor any man could foresee conditions. Perhaps it might not be too much to suggest that he was sufficiently able to understand certain immutable principles upon which the men of his day and of the preceding generation did believe the Constitution was founded.

LABOR.

Crucial Issues in Labor Legislation. Jeremiah Smith. Mr. Smith continues in this paper his series of exhaustive examinations into these "Crucial Issues." In this paper he takes up the well known line of cases represented by *Plant* v. *Woods*; *Allen* v. *Flood*; *Temperton* v. *Russel*, *Quinn* v. *Leatham*, and the *Mogul Steamship Company* v. *McGregor*. As in the previous papers Mr. Smith presents the various sides of what may be termed a controversy upon the points covered by these cases; as before, while there is a judicial and impartial presentation, there is no judicial decision. The scholarly examination, however, does doubtless, clear the air for the decision which will ultimately be worked out, not, it seems probable, in the closet, but in the court room and the legislative hall.

Harvard Law Review, April, pp. 429-455.

CONTRACTS.

Conditions in Contracts. George P. Costigan, Jr. The "Rules on Conditions in Contracts," which Professor Langdell formulated for the use of the students in his classes at Harvard, "constitute the inspiration and the foundation of this article." This fact alone is sufficient to make one turn with interest to the article, which, nevertheless is hampered by the form which this following of the rules implies. Upon some points Mr. Costigan prefers to follow his former teacher, Professor Williston, and to them both he credits all merit that may be found in the article. An examination will show, however, that Mr. Costigan has contributed a good deal of valuable matter, and has made an excellent analysis of the subject, contributing in addition some interesting notes upon points which are as yet controvertible.

Columbia Law Review, March, pp. 151–171.

CONSTITUTIONAL LAW.

The Treaty-Making Power and the Reserved Sovereignty of the States. Arthur K. Kuhn. The author declines to discuss the merits of the Japanese-California-school question, but takes up the limitations upon the treaty-making power, which have "never been authoritatively defined." The Mafia riots of 1891 are first discussed, and it is claimed that the government avoided the issue, but that this will not always be possible, or even desirable, as "the shoe may be on the other foot." In stating the case of *Ware* v. *Hylton*, and the weight to be given to that decision, it seems to be implied (p. 176) that only one of the judges in that case (Paterson) had been a member of the Constitutional Convention of 1787. Mr. Wilson, however, was one of the most important members, if not in many respects the most important member, of the Convention. In view of his very strong and valuable theories this may be found to be a matter of some importance, since Mr. Wilson's views of the inter-relations between the states and the nation were more profound and original than those of any other member. Mr. Kuhn has approached his thesis with a mind in which there is a broad distinction between the "States rights theories" and those theories which do not seem to have acquired any particular name or status but may perhaps, be called national. He inclines to the latter theories. This being so it is not necessary to state that he feels that the "treaty-making power must reside centrally or nowhere." It would be equally certain that a writer holding the "states rights theories" would decide that it must reside "nowhere" if the rights of the states be ignored. With preconceived ideas of this sort it is impossible that an argument on either side can be of value, but it may be entertaining and Mr. Kuhn's article is interesting.

Columbia Law Review, March, pp. 172–185.

CONSTITUTIONAL LAW.

The Japanese School Incident at San Francisco from the Point of View of International and Constitutional Law. Theodore P. Ion. In this article we have perhaps as fair a discussion of the points at issue, as has appeared in legal periodical literature. We do not see, as the discussion of the first case is in progress, just which theory of interpretation Mr. Ion has a thesis to uphold, and, in fact, we do not discover it at any point of the discussion. It would seem, if the matter had been looked upon from this eminently reasonable and common

sense point of view that it would have very early appeared that the incident was, as he calls it "insignificant in itself," although possibly not so in its consequences.

In the international aspect the question as to whether the treaty with Japan was violated or not, by the action of the San Francisco School Board, is treated with care. The conclusion is that, "there is a well established principle of the law of nations that aliens whilst residing in foreign territory cannot by right obtain admittance to the educational institutions of such country, unless there is a treaty stipulation expressly mentioning the grant of such a privilege and that, the mere right of residence with all its privileges cannot be considered as being sufficient, to justify a claim for admittance by foreigners to such educational institutions. Therefore, the claim of Japan, that her treaty rights have been violated by the action of the Board of Education at San Francisco, does not seem to be founded either in theory or in usage; but as a sovereign power Japan is at full liberty, if she considers the action of the California authorities as an act of discourtesy, to resort to 'retortion', *i.e.*, to apply the same treatment to students from California residing in Japan or she may even extend such retaliation to all American students within her territory, But between a violation of a treaty right and an infringement of the rules of the 'comity of nations,' there is a great difference; the former giving the right to denunciate a treaty, the latter justifying a state in resorting only to friendly retaliations."

The second question touched is whether the segregation of pupils of Mongolian descent is constitutional and does not violate the 14th Amendment. The discussion here is more closely along the lines usually argued in connection with this case, but it appears to be more logically arranged than most. The conclusion is that, "if the Japanese, during their residence here, are placed on the same footing with the citizens of the United States by the clause of the most favored nation in the treaty of 1894, it is evident from the above exposition of the settled law of the country, that their exclusion from schools designed for white pupils, cannot be considered as a discrimination and consequently there is no violation of a treaty right."

The third and last question examined is "whether a treaty concluded by the United States Government and ratified by the Senate, can supercede all State rights." On this point Mr. Ion finds no absolute yes or no. There remains, after a discussion of the cases, a "divergence of opinion" which leans to one side or the other, but which neither side can absolutely claim. But in regard to the specific claim of Japan Mr. Ion says that "neither in the letter nor in the spirit of the treaty of 1894 with Japan, is there anything which substantiates the claim of the Japanese government to the right of education for her subjects in the public schools of the States of the Union, or in those under the control of the Federal Government; that such a right cannot be deduced from the wording of the treaty and it can only be acquired by a special stipulation, and such is not the present case."

Michigan Law Review, March, pp. 326–343.

LEGAL EDUCATION.

The Opportunities and Responsibilities of American Law Schools. Floyd R. Mechem. Mr. Mechem touches upon the growth of the American Law School, and shows that it has, within a quarter of a century, superceded the teaching of law in the law offices. He speaks of the enlarged demand for men and equipment, "for better men and

better equipment." This means, as he says, a greatly enlarged opportunity and an equal responsibility. The law school must be the place where the best legal teaching is to be found, and the best methods used. He does not want to place too much stress upon methods, but thinks that "under the right circumstances and conditions, the careful study of decided cases is best calculated to attain the ends we seek." But he believes that "the man is more than the method" and that great teachers have done much with other means. He thinks it will be a mistake to place in our law schools too many men who have had no practical experience at the Bar. "I believe that, in the main, no man can be really the best teacher of the law who has had no experience in practice." "Law, as it looks to the theorist in his study and law as it looks to the lawyer in consultation or the court room, are often radically different things."

The law school must also be the place where "the most original and most scholarly investigation is carried on." Here the law teacher has the best opportunity. "He has unsurpassed library facilities, he has the advantage of consultation with his colleagues who are also experts in cognate fields and he has the opportunity of hearing the discussions and answering the objections of successive classes of bright students whose arguments in many cases . . . would do credit to the older members of the bar." The development of legal history; of the scientific side of the law; to serve the state in its legislation; and the state officers as counsellor, are also a part of the work of the law school, as Mr. Mechem believes. He emphasizes the duty of the law school to develop the ethical side of the law and the profession. "Law is the official moral code of the community. It is the organized and manifest expression of the public sense of justice. It endeavors to establish and enforce what is believed to be the highest practical, workable, livable, ethical code."

"The ethics of the profession must also look to the law school for their inspiration and support, surely no duty of the law school can be greater than this. It has within its halls the Bench and Bar of the future. They are there at their most plastic and impressionable age. At no period in their lives can right standards and right ideals be more certainly created. During this period must be sown the seeds which shall bear a harvest in after life. The reputation of the school may also be made to serve a useful purpose in this particular. To a pride in their profession and its requirements there may be added a pride in their law school connection which shall be an anchor when temptation overtakes them."

Michigan Law Review, March, pp. 344–353.

BIOGRAPHY.

James Wilson—Nation Builder. Lucien Hugh Alexander. The third part of this very interesting series, takes Mr. Wilson through a period of his life immediately preceding the Constitutional Convention, when his activities were immensely varied, noting especially his services in regard to the Bank of North America, and Hamilton's indebtedness to him in his report to Washington on the Finances. His services in the great convention are set forth in detail, showing how all-embracing were the activities into which he put forth such energies as few men possess. No one more than Mr. Alexander, appreciates the profound depth of Mr. Wilson's thought, or the extent of the services he rendered to his country.

Green Bag, March, pp. 137–146.

BIOGRAPHY.

Thomas McIntyre Cooley. Jerome C. Knowlton. As teacher of the law, as judge, as author, the subject of this sketch is so well known to men of these three classes, that it might be said there was little new to say of him. He belonged to what may now be called a conservative school of constitutional interpretation and Mr. Knowlton says,

"It is easy to understand what would have been the views of Judge Cooley on many of the questions that have been troubling us during the past ten years, regarding our out-lying dependencies. He would have been an anti-expansionist and possibly an anti-imperialist, but of this we are not so certain, for he was a firm believer in a strong government when control was once assumed or acquired through the exigencies of war. He recognized the law of necessity, but was slow to cast aside implied limitations in our national Constitution on any ground of expediency or policy. He was not impressed with our manifest destiny as a world power. The verdict of history is not in accord with his views on the annexation of Hawaii."

Michigan Law Review, March, pp. 309–325.

MONOPOLIES.

Monopolies and the Law. Frank B. Kellogg. The argument is strongly in favor of the power of the Federal government to deal with this question of monopoly. Mr. Kellogg asks, "If at common law a grant of monopoly to a single person or corporation was void because it destroyed freedom of trade, discouraged labour and industry which should be free to all the subjects of the realm, why is it not void for the same reasons when accomplished by a single individual or corporation by other methods? If it is against the policy of the law to grant perpetual monopoly in any commerce, which would deprive the people of the right to engage in that industry, how is it less against the policy of the law for a single corporation or individual to gain control of all the commerce in a particular article, through purchase or acquisition of competing properties, or through any other means or device? We are not invoking a new principle against an old device, but an old principle against a new device. Principles are everlasting. Devices change. In our opinion it is against the terms and the spirit of the Sherman Act for any man or set of men, through the form of corporate action, to acquire dominant and controlling power over any commerce, with intent to monopolize that commerce, whether this be done through the form of purchase of competing properties, or in any other form." He notes the fact, mentioned by other writers on the subject, that the excuse of freedom of contract may be used to make men unfree. Mr. Kellogg does not favour indiscriminate legislation or ignorant fulminations against wealth in general or corporations in particular, but he does believe in intelligent legislative direction and limitation of great industries, and he also believes that the Federal Government has alone the power to properly control these activities.

Green Bag, March, pp. 147–155.

CORPORATIONS.

The Imprisonment of Criminal Corporations. Donald R. Richberg. This article continues a discussion aroused by a former article on the Imprisonment of Corporations, which was dissented from by Mr. Frederick N. Judson, in the December number of the Green Bag. Mr. Judson did not think that increased penalties would diminish the

offences; he did think that the public at large would suffer; that preventive remedies are more efficacious than punitive, and that individual responsibilities should be increased. In regard to the first point Mr. Richberg says that in dealing with corporations we have not to deal with the emotions and psychology of human beings, but that we have a business proposition to face, pure and simple. Therefore we have not the same reasons for dispensing with harsh punishments as in the case of a human being. We have to find the deterrent punishment and apply it. The only innocent parties likely to suffer would be "those parties who have been led by false representation to invest their money in an illegal concern." It is very pertinently asked why such persons should be protected by a law which protects no others of their class. Mr. Richberg is apparently right when he claims that such innocent persons have a perfectly good opportunity to inform themselves as to the stock in which they are investing, and the conditions surrounding them and therefore have little standing in a court of law as innocent purchasers. In any reform these stockholders always arise to suppress any action in regard to monopolistic corporations, threatening to make any and all persons suffer if their interests are imperilled for the general good. It does not seem likely that the public would suffer, as Mr. Richberg says, by the "substitution of government control of enterprises for private criminal control." The suggestion that preventive remedies are more efficacious than punitive ones, is accepted by Mr. Richberg, but he adds "the preventive remedy suggested—that of injunction—has been in existence for many decades and our present system of wide monopolistic control of practically every important industry bears eloquent witness to the efficacy of this remedy." He also suggests that "as long as it is necessary to have punitive laws by the thousands on the statute books to hold fear before the eyes of the private individual, it will also be necessary to have punitive laws to restrain the pernicious activities of artificial persons."

Green Bag, March, pp. 156–162.

Equitable Interests in Foreign Property. Joseph H. Beale, Jr. Mr. Beale summarizes the conclusions as to the first part of his article as follows, "An equitable interest in land can be created only by the law of the situs: if that law creates an interest, the courts of all other states must recognize and enforce it; while, if the law of the situs does not create the equitable interest, no foreign court can assume the existence of such an interest. But since equity acts *in personam* it has power to act wherever it has jurisdiction over the person of a defendant; and if a defendant is shown to be in default for a breach of obligation, it may, in some cases at least, decree a conveyance of land by way of reparation for the injury, although there was no prior interest in the land created by the law of the situs." The limitations of the power are then examined, as are the principles regulating trusts of moveables.

Harvard Law Review, March, pp. 382–397.